ADMINISTRATIVE APPEAL OF
NED MCKENSLEY AND NELLIE MCKENSLEY
v.
AREA DIRECTOR, NAVAJO AREA OFFICE,
BUREAU OF INDIAN AFFAIRS, ET AL.

IBIA 75-46-A Decided October 24, 1975

Appeal from a decision of the Area Director, affirming the decision of the Superintendent, Shiprock Agency, canceling farm lease.

Reversed.

APPEARANCES: Michael V. Stuhff, Esq., for appellants; Office of the Solicitor, Window Rock, Arizona, by Robert Moeller, Esq., for appellee Bureau of Indian Affairs; Lawrence A. Ruzow, Esq., for appellee Navajo Tribe, Window Rock, Arizona.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

This is an appeal from the decision of the Area Director, Navajo Area Office, Bureau of Indian Affairs, Window Rock, Arizona, affirming the decision of the Superintendent, Shiprock Agency, Shiprock, New Mexico, canceling farm lease covering Navajo Tribal land, Tract No. 130 of the Hogback Irrigation Project. The contract was entered into in accordance with the provision of existing law and regulations (25 CFR 131) on January 1, 1973, and approved by the Acting Superintendent, Bureau of Indian Affairs, on April 26 1973. The lease was for a period of 10 years beginning January 1973, and expiring on December 31, 1982.

On September 9, 1974, the Acting Superintendent, Shiprock Agency, issued appellants an official notice to show cause within 10 days why their lease should not be canceled for the following violations:

1. Failure to develop and make beneficial economic use of the farm as set forth in the farm plan for Plot 130.

2. Failure to pay irrigation assessments as required by item 3, page 2 of the lease.

3. Failure to pay annual rental as stipulated on page 1 of the lease annual rental of $360.00 being delinquent since January 1, 1973.

4. Failure to pay interest due on delinquent rental as required by item 2, page 2 of the lease.

On September 18, 1974, through their attorney in fact the appellants responded to the show cause letter as follows:

> 1. Contrary to his failure to develop and make use of this farm lease Mr. McKensley admits that this is due to lack of complete control and technical difficulties involved. In that, since the lease was granted he was doubtful to full control of the land because on August 23, 1973, he was informed by a copy of a letter from Cato Sells, Director, Division of Agriculture and Livestock that the Resource Committee had granted 56 acres of the 102 acre farm lease to Mr. Johnson Washburn for reasons unexplained. Also, Mr. Washburn still claims an interest to the lease. Mr. McKensley with all respect attempted to enter into an agreement with Mr. Washburn for his interest in the land, but his stalling left Mr. McKensley in suspicion to this date. Mr. Washburn is currently attempting to harass Mr. McKensley with groundless action through the Office of the Tribal Prosecutor.
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> 2. Mr. McKensley did not use the farm as he had planned due to the conflicting status of the farm lease. Mr. Washburn is the person that used the water in Tract No. 130 to produce alfalfa for the past 6 years. This is the responsibility of Mr. Washburn according to previous oral agreement between the two.
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> 3. Mr. McKensley is willing to pay any and all delinquent lease rental fees dating back to April 26, 1973, upon complete word of honor that lessee will have complete control of the lease without further harassments or bindings.
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> 4 . The interest due on delinquent rentals as stated above is that Mr. McKensley is willing to remit any delinquent fees which is equitable in that the Resource Committee cannot charge rental for 116 acres after taking 56 acres back.

The Acting Superintendent advised the appellants by letter decision of September 23, 1974, that the reasons set forth in the September 18, 1974, letter did not adequately substantiate that corrective action and/or compliance had been met; that their lease was canceled; and that they were required to pay all delinquent irrigation assessments, annual rentals, interest and any other obligations incurred against the premises resulting from lease occupancy. Appellants appealed to the Area Director who affirmed the decision of the Superintendent on November 21, 1974. An appeal was then taken to the Commissioner of Indian Affairs who forwarded same to this Board for its consideration and appropriate action.

In substance it appears that the issue before this Board is whether the Bureau of Indian Affairs complied with its own regulations prior to canceling appellants' lease.

Specifically, we refer to Section 131.14 of 25 CFR which provides in part the following:

> Upon a showing satisfactory to the Secretary that there has been a violation of the lease or the regulations in this part, the lessee shall be served with written notice setting forth in detail the nature of the alleged violation and allowing him ten days from the date of receipt of notice in which to show cause why the lease should not be cancelled.* * *
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> * * * If within the ten-day period, it is determined that the breach may be corrected and the lessee agrees to take the necessary corrective measures, he will be given an opportunity to carry out such measures and shall be given a reasonable time within which to take corrective action to cure the breach. If the lessee fails within such reasonable time to correct the breach or to furnish satisfactory reasons why the lease should not be cancelled, the lessee shall forthwith be notified in writing of the cancellation of the lease * * *.

A review of the record leading up to the Superintendent's decision to cancel appellants' lease discloses that one Johnson Washburn wrote to the Chairman, Navajo Tribal Resources Committee, on May 24, 1973, approximately 1 month after the lease agreement between the Tribe and the appellants was approved by the Bureau. In the letter Mr. Washburn advised as follows:

> I would like to patition (sic) you and the Resources Committee to consider decision of Plot 130, Hogback Project.

> Plot 130, as I understand, has been approved for lease to Mr. Ned McKensley. However, during the past few years, I have been improving the upper part of Plot 130, to the extent of establishing a good stand of alfalfa, purchasing farm equipment to handle it, etc. I feel since Mr. McKensley has shown no effort to utilize this tract, and I have made substantial investment, the upper portion of tract should be added to my lease, and only the lower portion leased to Mr. McKensley. * * *

On August 9, 1973, the Resources Committee of the Navajo Tribal Council met, at which time the lease of Plot 130 to Ned McKensley was considered. The minutes of the meeting indicate among other things that -

> * * * Mr. McKensley has a lease for 102 acres and has not improved any part of that land as yet. At one time there had been an agreement made between Mr. McKensley and Mr. Washburn so that Mr. Washburn could improve 56 acres and has done this, now Mr. McKensley is telling Mr. Washburn to get off the land within one years time. Mr. Washburn would like to get a lease in his name for the area that has been improved by him. It was reported that Mr. McKensley has no farm equipment and it would be best to let him keep the remaining 46 acres. * * *
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> Mr. Morgan stated that if he should be allowed to keep the 46 acres then he should be given certain standards of improvements to meet in order to retain this portion. Motion was made by Mr. Morgan to issue lease to Mr. Washburn for the 56 acres and seconded by Peter Deswood. Approved with 8 in favor, and 0 opposed.

By letter dated August 23, 1973, Cato M. Sells, Director, Division of Agricultural & Livestock Development, Navajo Tribal Council, advised Albert Keller, BLO, Shiprock Agency, to process the lease as acted on by the Resources Committee on August 9, 1973.

On August 27, 1973, Cato M. Sells wrote to appellant, Ned McKensley, as follows:

> During the Resources Committee meeting, August 9, 1973, a matter came before the committee concerning you and Mr. Johnson Washburn. After a long discussion, the committee felt that Mr. Washburn was entitled to a portion of your farm, inasmuch, that he devoted time and effort in planting crop, that he should share in the profit.

> The committee voted 8 for and 0 opposed, to give fifty-six (56) acres of your farm to Mr. Washburn. This leaves you with forty-six (46) acres out of the one hundred and two (102) acres.
>
> The Resources Committee gave Mr. Albert Keller, BLO, Shiprock, to proceed with the necessary documents, to expedite this decision made by the committee.

The Resources Committee met again on January 8, 1974, at which time "it was unanimously agreed to investigate the land, meet again in March and meet with Mr. Keller, who should know more about this matter."

On September 18, 1974, the Resources Committee held a special meeting in order to settle the matter between Ned McKensley and Johnson Washburn. A memorandum dated September 19, 1974, from Mr. Cato M. Sells, Director, Agricultural & Livestock Development, To Whom it May Concern, discloses what transpired at this meeting:

> * * *The meeting started soon after 10:30 a.m., in the Office of Operations conference room. The committee did not adjourn until about 4:15 p.m. that day. Both parties of this case and their parties were all present for the meeting. Every opportunity was given to both parties to express themselves to the committee, and both parties were given ample time in the discussion to resolve the matter. There were no unexplained items left in this matter.
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> Late in the afternoon, the committee went into an executive session in order to expedite the matter, so that less time would be loss (sic), as there is a need for the alfalfa hay to be harvest (sic). The committee finally came to a conclusion when Mr. Herbert Morgan made the motion that the committee would reaffirm their stand as of August 9, 1973.* * *

We cannot agree with the Superintendent's decision of September 23, 1974, affirmed by the Area Director, canceling appellants' lease.

It appears that a decision had been arrived at as early as August 9, 1973, 3 months and 13 days after the lease was approved, to cancel appellants' lease, award 56 acres of Plot 130 to Mr. Washburn, and allow appellants to retain 46 acres of said plot.

We find with respect to the Acting Superintendent's show cause letter of September 9, 1974, that appellants' action did not constitute a failure to develop and make beneficial economic use of the farm as set forth in the farm plan for Plot 130.

Johnson Washburn had been on the land continuously from prior to April 26, 1973, the date the lease was approved by the Bureau of Indian Affairs. The Tribe and the Bureau were alerted to Washburn's presence on the land by Mr. Washburn's letter of May 24, 1973, assuming they were not aware of it earlier. Moreover, action was taken by the Tribe canceling 56 acres from the appellants' lease as early as August 9, 1973.

We further find that reasonable opportunity was not afforded to the appellants to develop and make beneficial economic use of the farm as set forth in the farm plan for Plot 130.

We conclude that, once being placed in sole possession of said lands, the appellants shall be given a reasonable opportunity to pay a prorated irrigation assessment, annual rental and interest due on delinquent rental from January 1, 1973.

In view of the reasons hereinabove stated the Board finds that the action taken by the Area Director and the Superintendent canceling appellants' farm lease was not justified and their decision should be reversed.

NOW, THEREFORE, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, the decision of the Area Director, Navajo Area Office, Window Rock, dated November 21, 1974, affirming the decision of the Superintendent, Shiprock Agency, dated September 23, 1974, canceling appellants' farm lease for Plot 130 approved April 26, 1973, be, and the same is hereby REVERSED.

This decision is final for the Department.

Done at Arlington, Virginia.

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Mitchell J. Sabagh
Administrative Judge

I concur:

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Alexander H. Wilson
Chief Administrative Judge